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# Forcing under Redevelopment to Proceed Building by Building: North Carolina's Flawed Policy Response to *Kelo v. City of New London*

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## **Forcing Urban Redevelopment To Proceed “Building by Building”<sup>1</sup>: North Carolina’s Flawed Policy Response to *Kelo* v. *City of New London*\***

Courts and legislatures have long struggled to determine the appropriate scope of a government’s power to take private property for public use under the doctrine of eminent domain.<sup>2</sup> Specifically, legislatures statutorily confer eminent domain powers upon an agency or group to take private land for a designated public use,<sup>3</sup> and the judiciary decides whether the exercise of that power infringes on any individual constitutional rights.<sup>4</sup> These competing interests came to a controversial head in *Kelo v. City of New London*<sup>5</sup> when the United States Supreme Court considered whether a Connecticut statute, which authorized the City of New London to take private property for general economic purposes, fell within the constitutional meaning of “public use.”<sup>6</sup> The properties condemned in *Kelo* were not blighted or taken for urban redevelopment purposes; rather, general economic development was the goal.<sup>7</sup> Specifically, the takings cleared

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1. *Berman v. Parker*, 348 U.S. 26, 35 (1954).

2. *See Kelo v. City of New London*, 545 U.S. 469, 483 (2005) (“For more than a century, our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power.”).

3. One example of a “public use” is the construction of police stations or public highways. *See State v. Core Banks Club Props., Inc.*, 275 N.C. 328, 334, 167 S.E.2d 385, 388 (1969); *see also* N.C. GEN. STAT. § 40A-3 (2005) (outlining who may exercise the right of eminent domain), *amended by* Act of Aug. 10, 2006, ch. 224, § 2, 2006-3 N.C. Adv. Legis. Serv. 394, 394–98 (LexisNexis).

4. *See, e.g., Kelo*, 545 U.S. at 472 (determining whether a city’s proposed disposition of property “qualifies as a ‘public use’ within the meaning of the Takings Clause of the Fifth Amendment to the Constitution”).

5. 545 U.S. 469 (2005).

6. *Id.* at 472; *see also* U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”). The Connecticut statute authorizing the taking in *Kelo* permitted municipalities to acquire and improve lands in order to encourage business and industry growth within that area. CONN. GEN. STAT. ANN. § 8-186 (West 2005) (“[T]he economic welfare of the state depends upon the continued growth of industry and business . . . [and] permitting and assisting municipalities to acquire and improve unified land and water areas and to acquire and improve or demolish vacated commercial plants for industrial and business purposes . . . are public uses and purposes for which public moneys may be expended . . .”).

7. *See Kelo*, 545 U.S. at 475 (“There is no allegation that any of these properties is blighted or otherwise in poor condition; rather, they were condemned only because they happen to be located in the development area.”).

the way for construction of a multi-use area that was “projected to create in excess of 1,000 jobs, to increase tax and other revenues, and to revitalize an economically distressed city, including its downtown and waterfront areas.”<sup>8</sup> Demonstrating great deference to legislative judgment as to what constitutes “public use,” the Court upheld the economic development takings,<sup>9</sup> authorizing the city to condemn several non-blighted, residential, single-family homes.<sup>10</sup> The dissent critically questioned the majority’s deference, predicting that, as a result of the decision, “[n]othing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory.”<sup>11</sup>

Many North Carolinians shared the dissent’s fears and vigorously opposed the decision.<sup>12</sup> Despite the fact that North Carolina law has never authorized takings for such broad economic development purposes,<sup>13</sup> North Carolinians still encouraged the General Assembly to act in order “to ensure that the kind of land grab that New London pulled cannot happen here.”<sup>14</sup> What they may not have realized, however, is that North Carolina’s eminent domain laws differ significantly from the Connecticut law that authorized the economic development takings in *Kelo* (the “*Kelo* statute”). Specifically, the City of New London’s power to redevelop for economic purposes came from authority granted in a Connecticut statute addressing

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8. *Id.* at 472. The economic redevelopment area was to include the creation of Fort Trumbull State Park and construction of a \$300 million research facility to be built by the pharmaceutical company Pfizer, Inc. *Id.* at 473.

9. *Id.* at 483–84 (“To effectuate this [economic development] plan, the City has invoked a state statute that specifically authorizes the use of eminent domain to promote economic development. . . . Because that plan unquestionably serves a public purpose, the takings challenged here satisfy the public use requirement of the Fifth Amendment.”).

10. See *infra* note 28 (describing several of the plaintiffs’ properties in *Kelo*).

11. *Kelo*, 545 U.S. at 503 (O’Connor, J., dissenting).

12. See *Calls For Restrictions on Eminent Domain Authority Come After U.S. Supreme Court Decision*, SOUTHERN CITY (Raleigh), July 2005, at 1 (noting that the decision “unleashed a flurry of editorials, columns and letters denouncing the decision across the nation and in North Carolina”).

13. See *id.*; S. Ellis Hankins, *U.S. High Court Didn’t Authorize NC Cities to do Anything More*, SOUTHERN CITY (Raleigh), July 2005, at 2; *infra* notes 15–18 and accompanying text (describing the difference between North Carolina’s eminent domain laws and the Connecticut statute at issue in *Kelo*).

14. Editorial, *Land Grab*, WINSTON-SALEM J., June 28, 2005, at A10; see also Gary D. Robertson, *New Limit on Taking Land Urged*, NEWS & OBSERVER (Raleigh), Apr. 26, 2006, at B5 (noting that while taking land for private economic development is not common in North Carolina, a law preventing the practice would calm public worries arising from *Kelo*).

municipal development projects,<sup>15</sup> which exists separately from the state's urban redevelopment laws.<sup>16</sup> The *Kelo* statute declares that encouraging business and industry growth is a public use and purpose for which public funds may be used.<sup>17</sup> While the North Carolina General Assembly has authorized condemnors to take land using eminent domain for such purposes as improving roads, building fire stations, installing utilities, or redeveloping urban areas, it has not authorized cities to take property for general economic development purposes.<sup>18</sup> Nevertheless, little more than a year after the *Kelo* decision, North Carolina amended the statutory purposes for which public and private condemnors may use eminent domain.<sup>19</sup>

This Recent Development briefly introduces the *Kelo* decision and the subsequent policy reaction from the North Carolina General Assembly, focusing specifically on the legislature's amendments to the Urban Redevelopment Law ("URL"). Then, utilizing two Greensboro case studies, this Recent Development asserts that the amendments to the URL may force planning commissions to inefficiently attack urban renewal "on a piecemeal basis—lot by lot, building by building."<sup>20</sup> Finally, this Recent Development concludes that North Carolina's policy reaction to the *Kelo* decision inhibits the ability of planners to efficiently address urban renewal, undermines urban redevelopment's non-economic policy goals, and is unnecessary in light of the fact that *Kelo*'s holding did not even address urban redevelopment.

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15. See CONN. GEN. STAT. ANN. §§ 8-186 to -200b (West 2005) (Municipal Development Projects).

16. See *id.* §§ 8-201 to -240j (Housing, Redevelopment and Urban Renewal and Human Resource Development Programs).

17. See *id.* § 8-186.

18. See Hankins, *supra* note 13, at 2 ("Our N.C. cities and counties have no statutory authority to use eminent domain for general economic development purposes, and the federal courts cannot provide it. The authority of our cities and towns comes from the N.C. General Assembly, which is not about to authorize use of the eminent domain power in this way."). Specifically, North Carolina law authorizes private condemnors to use eminent domain for purposes such as installing utilities, bridges, and roads. See N.C. GEN. STAT. § 40A-3(a) (2005), amended by Act of Aug. 10, 2006, ch. 224, § 2, 2006-3 N.C. Adv. Legis. Serv. 394, 394-95 (LexisNexis). Additionally, local public condemnors may use eminent domain only for a list of specific purposes, such as improving or building roads, parks, fire stations, and historic properties. See § 40A-3(b), amended by Act of Aug. 10, 2006, ch. 224, § 2, 2006-3 N.C. Adv. Legis. Serv. 394, 395-96 (LexisNexis). Urban redevelopment commissions are granted the power to use eminent domain pursuant to section 40A-3(c)(7) for the purposes set out in section 160A-515 of North Carolina's Urban Redevelopment Law ("URL").

19. See *infra* notes 33-47 and accompanying text (describing North Carolina's policy reaction to the *Kelo* decision).

20. *Berman v. Parker*, 348 U.S. 26, 35 (1954).

"Eminent domain is the power of government and some private companies (utilities, for example) to take private property for public use, upon the payment of just compensation."<sup>21</sup> Eminent domain powers are limited by the United States Constitution,<sup>22</sup> state constitutions,<sup>23</sup> and state laws.<sup>24</sup> Courts interpreting these provisions have determined that the Constitution requires first, that the taking of private property must be for public use or purpose, and second, that just compensation must be paid to the owner of the property taken or damaged.<sup>25</sup>

The Supreme Court in *Kelo* addressed one of these limitations: what precisely constitutes public use or purpose?<sup>26</sup> In *Kelo*, the City of New London approved an economic development plan for the city's Fort Trumbull area, including the creation of Fort Trumbull State Park, as well as the construction of a \$300 million Pfizer, Inc. research facility.<sup>27</sup> Several property owners within the redevelopment area challenged the city's authority to take their property using eminent domain powers, arguing "that the taking . . . would violate the 'public use' restriction in the Fifth Amendment."<sup>28</sup> The city argued that the plan would create a variety of commercial, residential,

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21. BEN F. LOEB, EMINENT DOMAIN PROCEDURE FOR NORTH CAROLINA LOCAL GOVERNMENTS 1 (2d ed. 1998).

22. The Fifth Amendment to the United States Constitution provides, "[N]or shall private property be taken for public use without just compensation." U.S. CONST. amend V. Further, the "public use" requirement is made binding on the States "by incorporation of the Fifth Amendment's Eminent Domain Clause through the Fourteenth Amendment's Due Process Clause." *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 244 n.7 (1984) (citing *Chicago B. & Q.R. Co. v. Chicago*, 166 U.S. 226, 241 (1897)).

23. Although the North Carolina Constitution has not specifically limited the right of eminent domain, article I, section 19 provides that "[n]o person shall be . . . disseized of his freehold . . . or in any manner deprived of his life, liberty, or property, but by the law of the land." N.C. CONST. art. I, § 19.

24. See, e.g., N.C. GEN. STAT. § 40A-3 (2005), amended by Act of Aug. 10, 2006, ch. 224, § 2, 2006-3 N.C. Adv. Legis. Serv. 394, 394-98 (LexisNexis).

25. Charles T. Lane & Daniel G. Cahill, *Land Condemnation Law*, in CUTTING EDGE ISSUES IN LAND CONDEMNATION I-1, I-3 to -4 (2004).

26. See *Kelo v. City of New London*, 545 U.S. 469, 472 (2005) ("The question presented is whether the city's proposed disposition of this property qualifies as a 'public use' within the meaning of the Takings Clause of the Fifth Amendment to the Constitution.").

27. See *id.* at 474.

28. *Id.* at 475. Nine property owners who owned fifteen properties in the Fort Trumbull area challenged the taking at issue in *Kelo*. See *supra* note 7 and accompanying text (discussing why these properties were taken). One property owner was born in her Fort Trumbull house in 1918 and had lived there her entire life. *Kelo*, 545 U.S. at 475. Susette Kelo, the lead plaintiff in the case, became a sympathetic figure both during and after the holding in *Kelo* when her pink, nineteenth century Victorian cottage with a water view was condemned by the City of New London. See Avi Salzman, *Homeowners Shown the Door*, N.Y. TIMES, July 3, 2005, § 14CN, at 1.

and recreational uses for the land that would provide new jobs, increase tax revenue, and rejuvenate an otherwise distressed area.<sup>29</sup> The property owners, on the other hand, suggested that such economic development purposes do not qualify as a public use.<sup>30</sup> The Court sided with the city, holding that “there is no basis for exempting economic development from our traditionally broad understanding of public purpose.”<sup>31</sup> Further, the Court rejected the idea that its holding would lead to cities “transferring citizen A’s property to citizen B for the sole reason that citizen B will put the property to a more productive use and thus pay more taxes.”<sup>32</sup>

In response to the Court’s controversial decision,<sup>33</sup> the North Carolina Speaker of the House formed the House Select Committee on Eminent Domain Powers to study the decision’s impact.<sup>34</sup> Although some North Carolina legislators, property rights groups, and commentators argued that an amendment to the state constitution was the only way to protect property owners from eminent domain abuse,<sup>35</sup> the committee did not suggest such a drastic

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29. *Kelo*, 545 U.S. at 483.

30. *Id.* at 484.

31. *Id.* at 485.

32. *Id.* at 486–87. *But see id.* at 505 (O’Connor, J., dissenting) (“Any property may now be taken for the benefit of another private party . . . . [T]he government now has license to transfer property from those with fewer resources to those with more. The Founders cannot have intended this perverse result.”).

33. *See supra* notes 12, 14 and accompanying text (discussing the responses to *Kelo* in North Carolina).

34. *See* H. SELECT COMM. ON EMINENT DOMAIN POWERS, INTERIM REPORT TO THE 2005 GENERAL ASSEMBLY, 2006 Reg. Sess., at 9 (N.C. 2006) [hereinafter INTERIM REPORT], available at <http://www.ncleg.net> (search “Search NCGA Web Site” for “Committee Eminent Domain”; then follow “HOUSE SELECT COMMITTEE ON EMINENT DOMAIN POWERS” hyperlink under “NCGA Site Search Results”).

35. *See, e.g.*, S.B. 1222, 2005–2006 Sess. (N.C. 2006), available at <http://www.ncleg.net/Sessions/2005/Bills/Senate/pdf/s1222v1.pdf> (proposing amendment of the North Carolina Constitution by addition of a section providing that “[n]either the State of North Carolina nor any local government or political subdivision may take any property by eminent domain where the purpose of the condemnation is to convey the property or its use to a private entity for either economic development or to increase tax revenues”); *see also* DAREN BAKST, JOHN LOCKE FOUNDATION, SPOTLIGHT NO. 275, A MODEL AMENDMENT: PROTECTING NORTH CAROLINIANS’ PROPERTY RIGHTS 2 (2006) [hereinafter BAKST, MODEL AMENDMENT], available at [http://www.johnlocke.org/acrobat/spotlights/spotlight\\_275\\_keloamdmnt.pdf](http://www.johnlocke.org/acrobat/spotlights/spotlight_275_keloamdmnt.pdf) (recommending an amendment to the North Carolina Constitution that contains specific language to prohibit all takings for private use); Michael McKnight, Comment, “Don’t Know What a Slide Rule is For”: *The Need for a Precise Definition of Public Purpose in North Carolina in the Wake of Kelo v. City of New London*, 28 CAMPBELL L. REV. 291, 294 (2006) (advocating that an amendment to the North Carolina Constitution defining the public purpose doctrine should be formulated because the doctrine “as it is now defined by the North Carolina courts, is inadequate to safeguard public funds from abuse by private interests”).

measure. Instead, the committee recommended legislation repealing local acts authorizing other uses for eminent domain power outside of those specifically enumerated in Chapter 40A,<sup>36</sup> and repealing the authority to use the power of eminent domain in connection with revenue bond projects.<sup>37</sup> The bill, signed into law on August 10, 2006, incorporated all of the committee's recommendations.<sup>38</sup>

However, the bill also included additional provisions amending the URL<sup>39</sup> that were not recommended by the committee.<sup>40</sup> Prior to amendment, the URL allowed redevelopment commissions to acquire, via eminent domain or otherwise, all properties within a defined "redevelopment area" that are "necessary or incidental to a redevelopment project."<sup>41</sup> A "redevelopment area" may include a "blighted area," an area where "*there is a predominance of buildings*" that are dilapidated, deteriorated, unsanitary, unsafe, or

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36. Draft Bill, 2005-RL-11A [v.3] § 1, *reprinted in* INTERIM REPORT, *supra* note 34, at 14–15. Condemnation procedures for cities and counties, private condemnors, and other public condemnors are governed by Chapter 40A of the North Carolina General Statutes. *See* LOEB, *supra* note 21. Chapter 40A limits the power of both public and private condemnors to use eminent domain for specific purposes (such as improving hospital facilities, constructing city halls and fire stations, and acquiring historic properties). N.C. GEN. STAT. § 40A-3 (2005), *amended by* Act of Aug. 10, 2006, ch. 224, § 2, 2006-3 N.C. Adv. Legis. Serv. 394, 394–98 (LexisNexis). Additionally, the Chapter grants urban redevelopment commissions the power to use eminent domain for the purposes set out in the URL. § 40A-3(c)(7), *amended by* Act of Aug. 10, 2006, ch. 224, § 2, 2006-3 N.C. Adv. Legis. Serv. 394, 397 (LexisNexis). Several acts have also granted local governments limited authority to condemn properties for purposes outside the scope of Chapter 40A, including limited powers to take for economic development purposes. *See, e.g.*, Act of July 6, 2000, ch. 89, 2000 N.C. Sess. Laws 485 (allowing the City of Charlotte to use eminent domain procedures for economic development purposes within a defined area).

37. *See* Draft Bill, 2005-RL-11A [v.3] § 1, *reprinted in* INTERIM REPORT, *supra* note 34, at 19. Interestingly, the recommended bill did not include amendments to the URL, which were eventually added in the passed legislation, *see id.*, nor did the first three editions of House Bill 1965. *See* H.B. 1965 drafts, *available at* <http://www.ncleg.net/gascripts/BillLookUp/BillLookUp.pl?Session=2005&BillID=H1965>.

38. *See* Act of Aug. 10, 2006, ch. 224, §§ 1, 2, 3, 2006-3 N.C. Adv. Legis. Serv. 394, 394–98, 399–400 (LexisNexis) (repealing local laws expanding eminent domain powers outside of Chapter 40A, making technical changes, and repealing power to use eminent domain in connection with revenue bond projects) (to be codified at N.C. GEN. STAT. §§ 40A-1, 40A-3, 159-83(a)(1)); Draft Bill, 2005-RL-11A [v.3] §§ 1–3 (recommending the same changes), *reprinted in* INTERIM REPORT, *supra* note 34, at 14–15.

39. N.C. GEN. STAT. §§ 160A-500 to -526 (2005).

40. *Compare* Act of Aug. 10, 2006, ch. 224, §§ 2.1–2.4, 2006-3 N.C. Adv. Legis. Serv. 394, 398–99 (LexisNexis) (to be codified at N.C. GEN. STAT. §§ 160A-503, -512(6), -515), *with* Draft Bill, 2005-RL-11A [v.3] §§ 1–3, *reprinted in* INTERIM REPORT, *supra* note 34, at 14–15.

41. § 160A-512(6), *amended by* Act of Aug. 10, 2006, ch. 224, § 2.3, 2006-3 N.C. Adv. Legis. Serv. 394, 398–99 (LexisNexis).

overcrowded.<sup>42</sup> Further, in order for a planning commission to use eminent domain to acquire a blighted area, at least two-thirds of the number of buildings within the area had to have been of the character described in the definition of “blighted area.”<sup>43</sup>

But as amended by the new legislation, the URL now includes a definition of “blighted parcel”<sup>44</sup> and provides that “eminent domain may only be used to take a blighted parcel.”<sup>45</sup> The effect of this small addition is far-reaching. Previously, redevelopment commissions could acquire all parcels within a statutorily defined “blighted area,” regardless of whether or not a parcel itself was blighted.<sup>46</sup> Under the amended URL, however redevelopers may exercise eminent domain to acquire a parcel *only if the parcel itself* meets the statute’s definition of “blighted.”<sup>47</sup>

These amendments to the URL significantly infringe upon the ability of local planners to fully realize their visions for urban development. Both the North Carolina courts and the United States Supreme Court have recognized the value in developing an entire area, and have stated that “community development programs need not . . . be on a piecemeal basis—lot by lot, building by building.”<sup>48</sup> In the Supreme Court’s landmark decision *Berman v. Parker*,<sup>49</sup> the Court recognized that city planners often need to plan for urban redevelopment as a whole:

[Experts believed it] was important to redesign the whole area so as to eliminate the conditions that cause slums—the

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42. § 160A-503(2) (emphasis added), *amended by* Act of Aug. 10, 2006, ch. 224, § 2.2, 2006-3 N.C. Adv. Legis. Serv. 394, 398 (LexisNexis).

43. *See id.* Redevelopment commissions could either retain the acquired property or sell it “to a single ‘redeveloper’ or in parts to several redevelopers.” § 160A-512(6), *amended by* Act of Aug. 10, 2006, ch. 224, § 2.3, 2006-3 N.C. Adv. Legis. Serv. 394, 398–99 (LexisNexis).

44. Act of Aug. 10, 2006, ch. 294, § 2.1, 2006-3 N.C. Adv. Legis. Serv. 394, 398 (LexisNexis) (to be codified at N.C. GEN. STAT. § 160A-503). A “blighted parcel” is an individual parcel of land on which there is a predominance of buildings or improvements that are dilapidated, deteriorated, unsanitary, unsafe, or overcrowded. *See id.*

45. *Id.* § 2.3, 2006-3 N.C. Adv. Legis. Serv. 394, ??? (to be codified at N.C. GEN. STAT. § 160A-512(6)).

46. *See supra* notes 41–43 and accompanying text.

47. Act of Aug. 10, 2006, ch. 294, § 2.3, 2006-3 N.C. Adv. Legis. Serv. 394, 398–99 (LexisNexis) (to be codified at N.C. GEN. STAT. § 160A-512(6)); *see supra* notes 44–45 and accompanying text.

48. *Berman v. Parker*, 348 U.S. 26, 35 (1954) (upholding as constitutional a city’s power to take private property for urban redevelopment purposes); *see* *Redevelopment Comm’n of Greensboro v. Johnson*, 129 N.C. App. 630, 634, 500 S.E.2d 118, 121 (1998) (quoting *Berman*, 348 U.S. at ???).

49. 348 U.S. 26 (1954).



overcrowding of dwellings, the lack of parks, the lack of adequate streets and alleys, the absence of recreational areas, the lack of light and air, the presence of outmoded street patterns. It was believed that the piecemeal approach, the removal of individual structures that were offensive, would be only a palliative. The entire area needed redesigning . . . . In this way it was hoped that the cycle of decay of the area could be controlled and the birth of future slums prevented.<sup>50</sup>

Unfortunately, the amendments to the URL may force city planners to focus on individual parcels, as opposed to larger blighted areas, thus impeding their ability to address urban redevelopment from a large-scale perspective.

The City of Greensboro's extensive redevelopment efforts provide us with two interesting case studies for the potentially negative effects of this new legislation. Consider, for example, Greensboro's South Elm Street Redevelopment Plan, launched in January 2004.<sup>51</sup> The plan calls for the acquisition of twenty-eight parcels of land spread over ten acres of downtown Greensboro that currently includes "a burned-out bakery, a smattering of vacant lots, some tainted by toxic chemicals, and the now-demolished site of the St. James II Homes, a low-income, city-subsidized apartment complex that became terminally blighted by crime and neglect."<sup>52</sup> The Greensboro Planning Board certified the redevelopment area as a "blighted area" on September 4, 2004, and the Redevelopment Commission of Greensboro has prepared a redevelopment plan, pursuant to its authority under section 160A-512 of the General Statutes of North Carolina.<sup>53</sup> The plan calls for residential

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50. *Id.* at 34–35. The Court subsequently endorsed this large-scale vision, noting that "[p]roperty may of course be taken for this redevelopment which, standing by itself, is innocuous and unoffending. But we have said enough to indicate that it is the need of the area as a whole which Congress and its agencies are evaluating." *Id.* at 35.

51. See SOUTH ELM STREET REDEVELOPMENT PLAN (Oct. 2006) [hereinafter REDEVELOPMENT PLAN], [http://www.southelmstreet.com/newsfiles/re-dev\\_plan\\_final.pdf](http://www.southelmstreet.com/newsfiles/re-dev_plan_final.pdf); see also South Elm Street News, <http://www.southelmstreet.com/news.asp> (last visited Aug. 16, 2007) (providing a timeline of the planning process).

52. Editorial, *Our Dusty Front Porch*, NEWS & RECORD (Greensboro), Aug. 21, 2006, at A8.

53. REDEVELOPMENT PLAN, *supra* note 51, § 4.1. Under North Carolina's URL, a redevelopment commission may be created (separately from a governing body within the municipality) that will focus on a particular area of redevelopment. See N.C. GEN. STAT. § 160A-504(a) (2005). Before a redevelopment plan has been prepared by the redevelopment commission, a planning commission (established separately by ordinance for a municipality) must certify an area as a redevelopment area (under the provisions of section 160A-503(16) of the General Statutes of North Carolina), and the certification must be in conformity with a general comprehensive plan for the area. See § 160A-513(a),

development, more than half of which will be owner-occupied lofts, apartments, and townhomes, and one-fifth of which will be moderately priced.<sup>54</sup> The plan further envisions office and retail space, parking, and a grocery store.<sup>55</sup>

The Redevelopment Commission further intends to acquire all of the current properties within the redevelopment area, as many such properties are blighted.<sup>56</sup> Subsequently, the Redevelopment Commission plans to sell the entire redevelopment area to a master developer who will then carry out the construction according to the city's redevelopment plan.<sup>57</sup> Ideally, the City of Greensboro and the Redevelopment Commission will easily be able to negotiate the purchase of all of the properties and may or may not have to use their eminent domain power to acquire the properties.<sup>58</sup> Under this scenario, the city will sell the purchased properties to a private developer of its choice who will carry out its development plan.<sup>59</sup>

Under the amended URL, however, it is not difficult to imagine a much different outcome. Imagine, for example, that one of the twenty-eight property owners within the redevelopment area is unwilling to sell his property and unwilling to consider owner redevelopment options.<sup>60</sup> Whereas before the amendments to the URL, the redevelopment commission would have been able to use eminent domain to take the property regardless of whether the parcel itself was considered "blighted" (as long as it was within a "blighted

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(b). For specific details of what the redevelopment commission's redevelopment plan must include, see section 160A-513(d).

54. Editorial, *supra* note 52. See generally REDEVELOPMENT PLAN, *supra* note 51, § 3.4.

55. Editorial, *supra* note 52. See generally REDEVELOPMENT PLAN, *supra* note 51, § 3.4.

56. See REDEVELOPMENT PLAN, *supra* note 51, § 4.5.

57. See *id.* § 4.3. The city has the authority to do this under the URL. See N.C. GEN. STAT. § 160A-512(6) (2005), amended by Act of Aug. 10, 2006, ch. 224, § 2.3, 2006-3 N.C. Adv. Legis. Serv. 394, 398-99 (LexisNexis).

58. For example, property owners within the redevelopment area may be willing to sell their property for an agreed-upon amount of money, and no condemnation processes would be required.

59. See REDEVELOPMENT PLAN, *supra* note 51, § 4.3 (discussing plans to choose a private developer).

60. The owner redevelopment option may be available if the property owner has a large land holding and is interested in redeveloping the property according to the Redevelopment Plan. If an agreement between the property owner and the Redevelopment Commission can be reached, the owner must remove all blighted conditions on the property and comply with the redevelopment goals and components of the overall project. See *id.* § 4.5 (explaining the "Owner Redevelopment Agreement" option for current property owners).

area”),<sup>61</sup> the URL as amended now prohibits the use of eminent domain unless the parcel itself fits the new definition of “blighted parcel.”<sup>62</sup> As a result, a single property owner will be able to impede or prevent a project meant to revitalize a “long underserved, largely minority sector of the city south of downtown.”<sup>63</sup>

Consider another example out of Greensboro prior to the URL amendments. In *Redevelopment Commission of Greensboro v. Agapion*,<sup>64</sup> a Redevelopment Commission initiated condemnation proceedings against nine residential rental properties owned by “Greensboro’s most notorious landlord,”<sup>65</sup> Bill Agapion. The trial court condemned eight of the nine properties, and both parties appealed the decision.<sup>66</sup> In remanding the case to the trial court for determination of whether the ninth property should be condemned, the North Carolina Court of Appeals recognized that “[r]ather than limiting a redevelopment commission’s focus to individual housing, the [URL] empowers a commission to take large-scale actions in an entire neighborhood if ‘there is a predominance of buildings or improvements’ . . . which ‘substantially impairs the sound growth of the community.’ ”<sup>67</sup>

However, the recent amendments to the URL eliminate the ability of redevelopment commissions to take the large-scale revitalization measures of which the court spoke in *Agapion*. For example, imagine that the Redevelopment Commission has planned extensive revitalization of a run-down area of Greensboro, an area

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61. See N.C. GEN. STAT. § 160A-515 (2005), amended by Act of Aug. 10, 2006, ch. 224, § 2.4, 2006-3 N.C. Adv. Legis. Serv. 394, 398–99 (LexisNexis).

62. See *id.*

63. See REDEVELOPMENT PLAN, *supra* note 51, § 1.1. While our Constitution has long valued the right to hold private property, the Supreme Court has also honored a municipality’s decision that a redeveloped area as a “whole [will be] greater than the sum of its parts.” *Kelo v. City of New London*, 545 U.S. 469, 483 (2005); see also *Berman v. Parker*, 348 U.S. 26, 35 (1954) (“If owner after owner were permitted to resist these redevelopment programs on the ground that his particular property was not being used against the public interest, integrated plans for redevelopment would suffer greatly.”). But see BAKST, MODEL AMENDMENT, *supra* note 35, at 2 (arguing that North Carolina’s old urban blight law was misused to take non-blighted property and suggesting that if a property is taken for public health or safety reasons, the threat should stem from a specific property itself).

64. 129 N.C. App. 346, 499 S.E.2d 474 (1998).

65. Editorial, *A Notorious Landlord Must Clean Up His Act*, NEWS & RECORD (Greensboro), Sept. 22, 2004, at A10 (noting that Agapion “has been cited for more than 14,000 housing code violations”).

66. *Redevelopment Comm’n of Greensboro*, 129 N.C. App. at 349, 499 S.E.2d at 477.

67. *Id.* at 352, 499 S.E.2d at 478.

that includes nine parcels owned by one landlord.<sup>68</sup> Eight of the nine individual parcels are unkempt enough to be considered “blighted,” but the landlord has minimally maintained one of the nine properties enough to barely avoid condemnation.<sup>69</sup> As a result, the Redevelopment Commission is prevented from taking the ninth property in the area and is forced to consider several less-than-ideal options. First, it could plan its renewal scheme around the still unsightly and run-down parcel. Attempting to purchase the parcel is another option, but city officials and taxpayers are reluctant to reward neglectful landowners with larger sums of money than they deserve for their property.<sup>70</sup> In the worst-case scenario, perhaps the redevelopment plan is abandoned altogether.

While some property rights groups may look at these hypothetical outcomes and declare victory, it is highly doubtful that the City of Greensboro will share their joy. The city has seen much success with past redevelopment projects, including its Southside and East Market Street revitalizations.<sup>71</sup> Similarly, projects such as Greensboro’s South Elm Street Redevelopment Project could bridge racial divides,<sup>72</sup> create a more aesthetically pleasing downtown, clean up environmentally harmful properties,<sup>73</sup> and bring respect back to

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68. Specifically, the amendments could become especially problematic for planners dealing with landowners such as Agapion, who owns \$19 million in low-rent real estate holdings around Greensboro, some of which have been named “Hell Town,” “the baddest hole[s] in Greensboro,” and “Roach Motels.” Lorraine Ahearn, *Agapion’s Barrio: Playing ‘Pollo’ With City Hall*, NEWS & RECORD (Greensboro), July 9, 2006, at B1.

69. For example, Agapion is apparently “a master of squirming through housing-code loopholes” in order to avoid condemnation proceedings. Editorial, *supra* note 65.

70. See Eric Swensen, *City Won’t Buy Property from Agapion*, NEWS & RECORD (Greensboro), Dec. 21, 2005, at B1 (reporting that the Greensboro City Council rejected a proposal to buy property owned by Agapion for \$1.65 million).

71. See Richard M. Barron, *City Begins Meetings on South Elm Redevelopment*, NEWS & RECORD (Greensboro), Aug. 20, 2006, at B1.

72. See REDEVELOPMENT PLAN, *supra* note 51, § 1.1 (“One of the central goals [of the redevelopment] has been to revive and integrate South Greensboro—a long underserved, largely minority sector of the city south of downtown—with newer economic development occurring to its north.”). But see Wendell E. Pritchett, *The Public Menace of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL’Y REV. 1, 47 (2003) (“In the decade following *Berman*, urban renewal programs uprooted hundreds of thousands of people, disrupted fragile urban neighborhoods, and helped entrench racial segregation in the inner city.... In cities across the country, urban renewal came to be known as ‘Negro removal.’”).

73. The area designated by the Redevelopment Commission includes “brownfields,” or areas that are “real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant,” as defined by the U.S. Environmental Protection Agency. South Elm Street Redevelopment Frequently Asked Questions, <http://www.southelmstreet.com/faqs.html> (last visited Aug. 16, 2007).

areas that are currently in disrepair.<sup>74</sup> Additionally, the South Elm Street Redevelopment Project would create a mix of affordable and market-rate residential units in the redevelopment area, as well as develop a “mixed-use framework that will support new businesses and more than 300 new jobs.”<sup>75</sup>

Indeed, urban renewal efforts such as the South Elm Street Redevelopment Project serve as a reminder that the post-*Kelo* fear of economic development takings is not the only concern, or even the most important concern, when conferring on city planners eminent domain powers. On the contrary, various other important policy matters should be considered, including the availability of safe and affordable housing, community relations issues, and concerns about the environment and city aesthetics. Specifically, the URL provides that it is “the policy of the State of North Carolina to protect and promote the health, safety, and welfare of the inhabitants of its urban areas.”<sup>76</sup> City planners and developers need tools like eminent domain powers in order to fully carry out these policy goals. They also may need the full strength of this power to combat neglectful landlords. Yet the new amendments to the URL limit the accessibility of this tool because they could inhibit the ability of redevelopment commissions to plan revitalization projects on a larger scale—based on an entire “redevelopment area.”<sup>77</sup> Instead, planners must now consider each individual parcel and its status as “blighted” when planning a redevelopment project. If the parcel is not “blighted,” although it may be within a “blighted area,” planners cannot take the property using eminent domain.<sup>78</sup> Thus, while the General Assembly intended to soothe property owners’ fears of economic development takings, it has impeded other important policy considerations, such as the promotion of health and safety through large-scale redevelopment, that underlie the URL.

Perhaps the strongest argument as to why the URL should not have been amended is that the *Kelo* decision did not alter the state of eminent domain law in North Carolina. In *Kelo*, the precise question was whether a Connecticut law authorizing eminent domain to be

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74. See Editorial, *supra* note 52 (noting that the area is a “crumbling embarrassment”).

75. See REDEVELOPMENT PLAN, *supra* note 51, § 1.2 (noting that funding from the U.S. Department of Housing and Urban Development (HUD) requires these provisions to be included in the plan).

76. N.C. GEN. STAT. § 160A-502 (2005).

77. See *supra* notes 39–47 and accompanying text (describing the changes to the URL).

78. *Id.*

used for general economic development purposes qualifies as a “public use” within the meaning of the Takings Clause of the Fifth Amendment.<sup>79</sup> However, the public purpose of the URL was established in North Carolina long before the *Kelo* decision was handed down.<sup>80</sup>

Specifically, in *Redevelopment Commission of Greensboro v. Security National Bank of Greensboro*,<sup>81</sup> the trustees of private property contested the condemnation of their property for a revitalization project authorized under the URL.<sup>82</sup> The trustees argued that the taking of the property by eminent domain was not for “public use,” but rather was a taking for private use because the Redevelopment Commission could resell the property to “any redeveloper for residential, recreational, commercial, industrial or other uses.”<sup>83</sup> The Supreme Court of North Carolina disagreed, pointing to the fact that the General Assembly has provided certain safeguards, so that the “redeveloper shall redevelop the property not in accordance with his own desires, but in accordance with the redevelopment plan so as to prevent for the foreseeable future a recurrence of the blighted area.”<sup>84</sup> In this case, even though the property was being transferred to a private redeveloper, it was not considered a taking for general economic development—rather, property was being taken pursuant to the URL for “public use.”<sup>85</sup>

Moreover, while North Carolina legislators amended the URL in response to *Kelo*, blight and urban redevelopment were never even at issue in the *Kelo* case.<sup>86</sup> Rather, the issue was solely the

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79. See *Kelo v. City of New London*, 545 U.S. 469, 472 (2005).

80. See *Redevelopment Comm’n of Greensboro v. Sec. Nat’l Bank of Greensboro*, 252 N.C. 595, 606, 114 S.E.2d 688, 696 (1960) (holding that the taking of respondent’s private property under the URL was for a public use); *infra* notes 81–85 and accompanying text.

81. 252 N.C. 595, 114 S.E.2d 688 (1960).

82. *Id.* at 602, 114 S.E.2d at 693.

83. *Id.* at 603, 114 S.E.2d at 694.

84. *Id.* at 605–06, 114 S.E.2d at 696.

85. See *id.* at 604–06, 114 S.E.2d at 695–96. The court stated:

This contention of respondent that the taking of its property is for private use misconceives the nature and extent of the public purpose or public use which is the subject of the Urban Redevelopment statute. The primary purpose of the taking is the eradication of ‘blighted areas,’ the reconstruction and rehabilitation of such areas, and the adaption of them for uses which will prevent a recurrence of the blighted conditions.

*Id.* at 604, 114 S.E.2d at 695. The court also noted that a private redeveloper may be able to effectuate the public purpose of the URL as well as, or better than, a government agency. *Id.* at 605, 114 S.E.2d at 696.

86. See *Kelo v. City of New London*, 545 U.S. 469, 483 (2005) (“Those who govern the City were not confronted with the need to remove blight in the Fort Trumbull area, but

constitutionality of a Connecticut statute—*separate* from the urban redevelopment statute—that authorized takings solely for economic development purposes.<sup>87</sup> Even Justice O'Connor, in her strong *Kelo* dissent, distinguishes economic development takings, which she would prohibit, from urban redevelopment takings, such as those held to be constitutional in *Berman*.<sup>88</sup> She also acknowledges that *Berman*, a case addressing urban redevelopment takings, was “true to the principle underlying the Public Use Clause.”<sup>89</sup> In addition, Justice O'Connor notes that urban redevelopment takings directly achieve a public benefit of eliminating blight caused by extreme poverty and thus “it did not matter that the property was turned over to private use.”<sup>90</sup> The fact that even the dissenting Justices recognized the distinction between urban redevelopment and economic development supports the conclusion that *Kelo* leaves unaffected the basic notion that the use of eminent domain for urban redevelopment is permissible under the Fifth Amendment to the Constitution. Nevertheless, the North Carolina legislature still unnecessarily responded to the decision by amending the URL.

Additionally, it seems that the North Carolina courts have not demonstrated any willingness to expand eminent domain powers for economic redevelopment purposes.<sup>91</sup> The Castle Coalition, the Institute for Justice's nationwide grassroots property rights activism project, cites only one instance of eminent domain power “abuse” in North Carolina.<sup>92</sup> In the single North Carolina case cited by the

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their determination that the area was sufficiently distressed to justify a program of economic rejuvenation is entitled to our deference.”).

87. See *supra* notes 15–18 and accompanying text (describing the difference between the Connecticut statute at issue in *Kelo* and the North Carolina URL).

88. See *Kelo*, 545 U.S. at 500 (O'Connor, J., dissenting).

89. *Id.*

90. *Id.* This is consistent with the North Carolina courts' holding in cases such as *Redevelopment Comm'n of Greensboro v. Sec. Nat'l Bank of Greensboro*, 252 N.C. 595, 114 S.E.2d 688 (1960). See *supra* notes 81–85 and accompanying text (describing *Redevelopment Comm'n of Greensboro* and determining that private property can be taken in North Carolina even if the property is to be resold to a private developer).

91. But see DAREN BAKST, JOHN LOCKE FOUNDATION, SPOTLIGHT NO. 279, A THREAT TO PRIVATE PROPERTY: N.C.'S BROAD AND SUBJECTIVE URBAN REDEVELOPMENT LAW 4 (2006), available at [http://www.johnlocke.org/acrobat/spotlights/spotlight\\_279\\_urbanrenewal.pdf](http://www.johnlocke.org/acrobat/spotlights/spotlight_279_urbanrenewal.pdf) (noting that the North Carolina courts have provided little oversight with respect to urban redevelopment takings and, instead, have generally deferred to the government).

92. Castle Coalition “Past Abuses” Interactive Map [hereinafter Castle Coalition Abuse Map] <http://maps.castlecoalition.org> (select “North Carolina” from “Select State” drop box to see examples of “abuses”) (last visited Aug. 16, 2007). The Castle Coalition cites as many as nineteen past abuses in California and ten in New York, in addition to numerous current controversies and threatened condemnations. *Id.*

Castle Coalition, *Piedmont Triad Airport Authority v. Urbine*,<sup>93</sup> the North Carolina Court of Appeals addressed whether the Piedmont Triad Airport Authority (“PTAA”) could take private property for an airport expansion. The new facilities, however, were to be constructed by Federal Express and leased exclusively to Federal Express, although the PTAA would remain the owner of the property.<sup>94</sup> The court determined that the “arrangement advances the primary goal of giving effect to the people’s general desire for better seaports and airports. As such, the greater benefits flow to the people, as they have constitutionally directed, with their understanding that there will be incidental benefits to private companies involved.”<sup>95</sup> But even the Castle Coalition admits that what “distinguish[es] this case from many of the others cited in [its] report is the fact that the property will continue to be owned by the government, even though it will be paid for and used by a private party.”<sup>96</sup>

But despite little, if any, evidence of North Carolina judges “abusing” eminent domain powers, an absence of statutory authority for economic development takings, the well-established “public purpose” of North Carolina urban redevelopment laws, and the many non-economic policy goals of urban renewal statutes, the North Carolina legislature still amended the URL in an unnecessary and improper response to the controversial *Kelo* decision. Not only does North Carolina not have a law like the Connecticut statute at issue in *Kelo*, the opinion did not even deal with urban redevelopment. Even the *Kelo* dissent recognized that urban blight “inflict[s] affirmative harm on society”<sup>97</sup> and acknowledged the value of broad eminent domain powers to eliminate that harm. Thus, while the General Assembly clearly has the power to expand or contract eminent domain powers in any constitutional way it sees fit, the recent amendments to the URL are an unnecessary response to the *Kelo* decision. Unfortunately, the amendments may make it much more difficult for planners to efficiently address the health, safety, and well-being of city residents and visitors.

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93. 354 N.C. 336, 554 S.E.2d 331 (2001).

94. *Id.* at 343, 554 S.E.2d at 335.

95. *Id.*

96. Castle Coalition Abuse Map, *supra* note 92 (click on “North Carolina” to see case commentary) (last visited Aug. 16, 2007).

97. *Kelo v. City of New London*, 545 U.S. 469, 500 (2005) (O’Connor, J., dissenting).